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A STUDY OF RIGHTS INCIDENT TO REALTY.

I. REAL PROPERTY RIGHTS RECLASSIFIED.

IT WILL be remembered on brief reflection that many rights relative to real property have always remained unclassified, and do not admit of classification in the tabulations of interests in real property familiar to us; and therefore they have been regarded as peculiar or individual phases of the law, not connected with the divisions of land law usually made. They include nuisances, the right of lateral support to land and buildings, air rights, water rights, and in general the rights of neighboring property owners to restrict each other to uses of land not incompatible with neighborly comfort. All these are, we shall see, conferred by law; and the obligations corresponding to them have been broadly and exactly comprehended by the maxim that one must so use his land as not unreasonably to interfere with his neighbor's use of his, or to quote the Latin, *"sic utere tuo ut alienum non laedas"*.

There are other important rights and duties connected with real property, which are conferred by acts of the parties, and these also have been generally left unclassified. They include, in addition to those rights which are the subject of express grant, rights gained by prescription and rights which are conferred by covenants which run with land. But these latter rights are not treated in this series of articles except incidentally, for contrast or in differentiating between them and the former class of rights conferred exclusively by law. The plan of this article is to show that, though these rights which are

conferred by law have not ordinarily been treated as akin to each other, they really are so, and are founded upon the same thorough-going principles, that their existence broadens and harmonizes the Common Law of property, and that they serve as points to mark its adaptability to modern as well as ancient requirements.

The course of modern law under the pressure of modern business has swept so rapidly along that the bounds of early and fundamental principles, though proportionately more important, have been progressively overrun. Hence at no time probably has it been so important to find our principles and mark our bearings. To do this, our first work is complete classification; and in recent years the judges, the digesters, the cyclopaedia writers and the text-book writers have striven more and more to that end.[1]

Not a small part of the difficulty in harmonizing real property rights under the Common Law into a system adapted to modern use may be traced to the lack of complete classification of such rights by our early masters. On account of the historical prominence of the feud and the particular rights having their source in tenure, the commentators upon English law during some 350 years devoted practically all their attention to feudal relations and rights; so that the law of tenures and the law of real property came to mean practically the same thing. Littleton, the first real compiler of our real property laws, confined his work to tenures; and his work on that subject was

[1] The one great branch of lawyers who unhappily are not striving to classify the law are the legislators, the branch whose work is the most to be condemned because the most responsible. But we cannot excuse ourselves by blaming the legislators as individuals. The selfishness or indifference of the bar is responsible for the hasty, unscientific legislation which congests our statute books. Nor can it be ascribed to any general popular demand for particular laws. There used to be an annual compilation of the work of American Legislatures, published by the New York State Library at Albany under the title "YEAR BOOK OF LEGISLATION"; and one of the most important revelations of this publication was that new and important changes are made in the law of property by almost every State Legislature, without any two of them being the same, the only common objective appearing through them all being to render it easy to sell and acquire property, without much thought of the consequence.

done so systematically and so thoroughly that the commentators have ever since laid first emphasis upon his system and have not added much to his classification. Hence in our day undue attention has been paid to a mere branch of the law of real property, now comparatively unimportant, and the principles which underlie this branch and which must connect it with the remainder have been left a confused mass. Even the great Blackstone, the most comprehensive commentator that the Common Law has ever had, in separating property rights, makes the most minute classification of tenures and their subdivisions into estates;[2] and treats of the remaining real property rights under the various heads of the particular actions to which the owner may resort for their infringement.[3] A nuisance he discussed only as a ground for an action on the case;[4] the right of lateral support is not even mentioned as having protection;[5] a covenant that runs with land is merely recited as such;[6] easements are nowhere treated as a class of rights;[7] light, air and water are set apart as peculiar natural rights.[8] And the duty to enjoy one's land consistently with one's neighbors' enjoyment of theirs is not recited even as a legal maxim.

But we should not regard this omission of the early masters to systematize the law of real property as a defect in their work as they planned their work. With the exception of Blackstone, and perhaps Sir Matthew Hale,[9] they did not plan anything like

[2] "In this property or exclusive dominion consist the rights of things; which are, (1) Things real. (2) Things personal. In things real may be considered, (1) Their several kinds. (2) The tenures by which they may be holden. (3) The estates which may be acquired therein. (4) Their title, or the means of acquiring and losing them." BLACKSTONE, ANALYSIS OF THE LAWS OF ENGLAND, p. 31, 5th ed. (1762). Cf. 2 BL. COM., p. 16, which follows this analysis.

[3] See 3 BL. COM.

[4] See 3 BL. COM., c. XIII.

[5] That the right of lateral support to land was recognized before Blackstone, however, see 2 ROLLE ABR. 564, Trespass I, pl. I. Also Wyate *v.* Harrison, 3 B. & Ad. 876. GRAY, LATERAL SUPPORT, p. 13.

[6] 3 BL. COM., p. 156.

[7] The only easements referred to especially are "ways", classed as one of the incorporeal hereditaments. 2 BL. COM., c. II.

[8] 2 BL. COM., p. 14.

[9] THE ANALYSIS OF THE LAW, by SIR MATTHEW HALE, 2nd. ed., London, 1716, is the only edition that I have seen. It covers 148 pages of octavo in large type—a mere tabulation, like the early commentators.

a systematization of the Common Law in any of its branches, that is to say, they did not propose to write works upon jurisprudence. Coke and Sir John Fortescue and Viner and Comyn and Hale and Stubbs all wrote law books. Their work was intended for daily use by pleaders; and the reason of this is not hard to find. The Common Law and English civilization were still too young. Apart from the relations of land tenure, the rights of a subject of the English Crown against his fellow subjects were still presented to the early jurists in the concrete form of reparation of personal injuries rather than in the abstract form of rights. A man's sense of justice is a part of the earliest forms of established civilization, but in the primitive court only the wronged man calls for reparation. After a special kind of reparation has been many times granted, whether by the King's court, or the wittenagemot, or the patriarch, it will become a custom, and thereafter need not be litigated any more in its principal form, but only in its variations. But innumerable individual wrongs with but slightly varying facts would have to be litigated in the primitive courts before their reparation would be based upon what might be called principles. Indeed it may be doubted whether the recognition of principles does not require more advanced civilization even than codification. On the other hand, the earliest sense of justice could demand rough consistency in judgments repairing the same kind of personal injury, and so the early advocate could rely with great safety upon precedent. Therefore he searched his memory and that of his fellows for earlier cases like his; and the first law writers compiled books of precedents.

The law of tenures, however, involved much more than the precedents for decision upon the contests of individuals. It was brought into England by the Normans a complete institution. It was as old as the kingdoms of continental Europe. It was old enough for principles to be formed. True, it was adopted and largely changed in England; but it was brought over as a system of law in itself, and the course of the English law of tenures was to apply and modify the old system rather than to create a new one. It not alone determined the rights by which

the tenant possessed the land upon which he lived, but it determined the right of the King to his army, to his taxes, to his Crown. It was the Constitution itself. Therefore a legal work on tenures must necessarily have involved much of the abstract; and Littleton's Tenures may truly be called a work upon jurisprudence.

Of course, our great debt to Glanvill and to Bracton for their systematization of the early law of England no one will or can ever question; and they both attempted something of a classification of all legal rights. But it is no irreverence to recall that the parts of their works which were intended to round up their commentaries into complete surveys of the laws were largely taken from foreign sources, and are the least valuable. Where Glanvill confined himself to the laws of England, he wrote a careful treatise on pleading, interspersed by rulings upon the laws and customs of tenure. And the part of Bracton's work which discussed first principles (other than those of tenure) is the part that we are told came from his teaching in Italy under Azo of Bologna;[10] and was not English law at all.

Sir William Blackstone, then, was the first author to attempt an analysis of the Common Law. But while Blackstone's Commentaries go far toward interpreting as well as stating the principles of the Common Law, the work is not, nor was it intended to be, a study of its fundamental principles. Blackstone only planned a broad survey of the field of law. He accepted its rights and obligations as he found them, and stated them clearly and concisely, often adding much of their history; but why they were what he found them and what relation they bore to each other he did not propose to say. For example, Blackstone tells us that the Common Law regards with the highest respect the man that is in peaceable possession of a piece of land, and that if he asserts a claim upon it for a sufficient length of time no one will be allowed to question his right thereto; and he says it is because it is more for the public good that the one in open,

[10] See Volume VIII of the reports of the Selden Society, entitled BRACTON AND AZO, by MR. F. W. MAITLAND.

peaceable possession should be protected in his long quiet enjoyment, than that the community be disturbed to restore to a slothful claimant an estate of which he may have been in fact unjustly deprived, thus justifying the Statutes of Limitation of 20 Henry III and 3 Edward I.[11] But Blackstone does not discuss why the Common Law pays such respect to mere possession.

Again, Blackstone tells us that if the owner of one piece of land has used a way across another piece of land for a given time the way becomes a part of the land of him who uses it. But why the land became increased by the addition of the servitude of the way, instead of the user of the way merely acquiring a new ownership in it,—why the way became appurtenant to the land of the user instead of the mere property of the user, Blackstone did not discuss.[12]

It can probably be truthfully said then that down to the beginning of the Nineteenth Century, down through the time of all the authoritative English commentators on the law, no effort of any kind had been made to find the source or basic principles of rights under the Common Law; there had been no thorough study of fundamental principles in their application to the law of real property, and no attempt to analyze and classify their various phases as they were developed into recognized rights.

And while much deep, original and eternal work has been done since that time, it has all come since the law had formed its currents both in England and America; and its effect, com-

[11] See 3 BL. COM., p. 188. Statutes of Merton and Westminister.

[12] For a scholarly discussion of the origin of the ownership by the land, instead of by the occupant, of rights in contiguous land, see HOLMES, COMMON LAW, c. XI. Mr. Justice Holmes therein attempted to demonstrate that the personification of land as the owner of other land arose in a confused allusion to the relation to master and slave between persons; but that it was only a partial analogy he shows by the fact that the right over the adjoining land as an easement had to be completely acquired before it became attached to the land as a part thereof, that is, before a disseisor could enjoy it. However, this inconsistent personification of land was not confined to the English Law; the Roman Law was guilty, too. HOLMES, COMMON LAW, p. 383, citing Papinian, Celsus, Paulus, and numerous instances in Justinian, especially the familiar phrase, *"Cum fundus fundo servit"*. DIGEST 8, 4, 12 and 8, 6, 12.

pared to what it would have been if done 300 years ago, is as the guiding force of an earthen levee on the lower Mississippi River compared to one of the rock jetties within 100 miles of its source.

Sir Frederick Pollock, in his little book entitled "The Expansion of the Common Law", contrasts the basic principle of the Common Law as founded upon the Germanic law of possession, involving the idea of clinging to the actual fact, seisin, with the basic principle of the Roman Law, founded upon the conception of actual ownership. We are therefore not to be surprised that the Parliament of Edward I was willing to pass a statute denying the right to disturb the possession of any man which had begun before the coronation of King Henry III. But if the modern student extol this statute as a peace producing act of our ancestors and an early sign of civilization, let him account at the same time for the degree of title gained by the heirs of a stranger who had violently deprived some boy of his lands from the moment the disseising stranger died on the land and the descent was cast.

And yet the possession of a disseisor was recognized as conferring rights long after the time of the first Statute of Limitations.[13] This same historical emphasis laid upon seisin was carried to great extremes. For a long time a man was said to be seised of a way over his neighbor's land, and it suggests itself that it was the difficulty of assigning incorporeal hereditaments by livery that made them become appurtenant to actual estates. The personification of the land itself, when the land is considered to have ownership and control over adjoining land, is very deep-set in our law. Mr. Goddard and Mr. Gale in their excellent works upon easements have both shown how thorough-going is the conception that the land which constitutes

[13] See 3 BL. COM., p. 176.

The Statute of 32 Hen. VIII, c. 33, abolished the effect of a descent cast unless the owner had been in peaceable possession five years.

3 WASHBURN, REAL PROPERTY, 6th. ed., p. 1951, states there is no distinction in meaning between "seisin" and "possession". But Washburn wrote before the value of accuracy in investigating legal history was fully appreciated. For a careful discussion of it, see CHALLIS, REAL PROP., 2nd. ed. The distinction is immaterial for present uses, however.

the dominant tenement actually owns the way of the common or the water right or the woodbote which its occupant enjoys by way of easement or profit over the adjoining land which constitutes the servient tenement. Bracton, discussing servitudes, speaks of land being subject to land, just as a man is the serf of another man.[14]

The idea of seisin did not attend the servitude in the Roman Law. Savigny assures us that the Roman lawyers had not even the notion that the usufruct was possessed; it was not to them an incorporeal hereditament, as we understand the word hereditament; it was merely one of the rights of ownership in the servient tenement abstracted and leaving the residue, as it were.[15]

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[14] Bk. II, Civ. S. 3, F. II. The passage seems to have been taken almost verbatim from Azo. See Vol. VIII, Reports of Selden Society, BRACTON AND AZO, pp. 130, 131, giving the text of each author.

[15] SAVIGNY, POSSESSION, Bk. I, § IX, after stating that the notion of possession requires the determination to possess for one's own use, shows that the application of this notion can only give rise to doubts in those cases where a party intends to exercise a right, the relation of which to property is doubtful. He then enumerates several such rights, the third among which is the servitude. He says: "Servitudes, *i. e.*, the rights introduced by the *jus civile*, which as detached portions of property (*jura, jura in re*) are opposed to property itself as the totality of all real rights. It follows clearly from this antithesis, which is essential to the definition of servitudes, that whoever means merely to exercise a servitude cannot at the same time have the *animus domini*. And there is only one instance which affords any ground for doubting this proposition, namely *usus fructus*. But the Roman Law does not recognize even the Fructuary as the owner, and indeed *proprietas* is the technical denomination of the right remaining after deduction of the *usus fructus*. In all easements, therefore, the *animus domini* is impossible."

And see GROEBER, ROMAN LAW OF DAMAGE TO REAL PROPERTY, in discussing remedy for injury to *"jus in re aliena"* under the *Lex Aquilia*, D. IX, 2.

This may not have been the case with the Civil lawyers, however. Azo of Bologna, from whom Bracton copied the passage referred to in the above note, spoke of a corporeal and an incorporeal *"res"*. But was this the same idea as hereditaments? Azo is enlarging upon the INSTITUTE, II, 2 & 3, whch says nothing about incorporeal rights, in naming the various servitudes.

Foot-note L to Savigny's text is as follows: "That the Romans meant this and nothing else by *jus in re*, that *dominium* is never included in it, but is expressly opposed to it, has been fully proved by WAECTLER, DE JURE IN RE VITEB., 1682, (also in THOMASII DISS. LIPSIUS, 1696, p. 235).

An investigation into the origin in history of the rights to be discussed in this article is not so difficult as the investigation into the origin of other branches of real property, as, for instance, those unclassified rights imposed by acts of the parties which were above expressly excepted from our field.[16] We can well see that rights over neighbors' lands which are imposed by law could not have very early recognition, as their rise must depend largely upon the close contact of a greater population than existed in England in the early period of her legal history. In the time of Edward I, the latter half of the Thirteenth Century, the whole population of England was probably not over two million souls, and that contact which required one terretenant to limit the uses of his property by respect for the uses of his neighbors would be comparatively rare. A too eager student of continental law classics might therefore easily embrace the so-called compact theory, so prevalent among Seventeenth and Eighteenth Century writers upon jurisprudence, and put into the minds of our English ancestors the same neighborhood agreements to observe each other's comforts which Pufendorf wrote into the minds of those earlier neighbors who lived under the domains of Roman and Civil Law.[17]

Huber laid down the same doctrine even earlier *animadvers. ad jus in re.* Franck, 1675, 12. Also in the DIGEST, LIB. 4, C. 10, and in FELTMANNORUM OPP. ARUH., 1764, T. 2, p. 257. This latter writer, however, with an extension which removes all precision from the notion; holding, namely, that the lender has the *jus in re.* Thibaut makes the same assertion; VERSUCHE, Bk. 2, 32. The only ground for this opinion is L. 2, § 22, *vi bon rapt;* but the words *'vel quod aliud jus'* refer not only just as well, but much better, to *'sive usum fructum."*

[16] See SIMS, COVENANTS THAT RUN WITH LAND.

[17] PUFENDORF, Bk. IV, c. VIII, § XI, after saying that the Civil Law divides real services into those of city estates and those of country estates, continues:

"The occasion of establishing all these services was generally taken from the neighborhood; a relation which may justly be thought to border very near on that of friendship. For, inasmuch as it contributed highly both to the profit and pleasure of men, that many of them should join their dwellings and possessions, which convenience could scarcely subsist should each person go about to exclude others from use of his property in every degree; therefore neighbors were wont to settle it amongst themselves, that no man should use his own things to all purposes and in all respects, lest others should thereby be reduced, as it were, to hardships and straights, but that each person should allow others such a moderate

But we have early data enough to disprove such a fictitious theory for the Common Law, and to show that, like all other legal principles, reciprocal neighborhood rights were a growth. Bracton, writing in the time of Henry III, the first part of the Thirteenth Century, seems to have grasped the principle when he said, after discussing remedies for the impairment of servitudes,[18] "Likewise if a servitude be imposed upon the ground of another by right and not by men as above, by which *it is prohibited that a person may not do in his own land that which may be a nuisance to his neighbor,*[18a] as if he should have heightened a pond in his ground or made one anew, through which he works a nuisance to his neighbor, that is, if thereby his neighbor's ground is put under water, this will be a tortious nuisance to the free tenement of his neighbor, unless it has been permitted by his neighbor that he may do it."[19]

But it may well be doubted whether Bracton's mind was not far in advance of the law of his time. The observation is made by the author as a converse proposition to the recognized right a person had to protect his enjoyment of a servitude or easement upon neighboring land. If the tenant of the servient tenement interfered with the easement, he actually did something on his own land which interfered with the established right of his neighbor, the tenant of the dominant tenement,—a very different inquiry from the injury arising from mere failure to consider one's neighbor's comfort. And if any confusion is caused by the broad statement of Bracton's proposition, all confusion is removed by the remedy which Bracton offered. The part of Bracton's work in which the paragraph appears, from Chapter 42 to Chapter 47, treats of nuisances primarily as injuries to

use of what he himself possessed as they could not want without great prejudice to their affairs. On the other side, it is a general rule to be observed in the challenging these services, that they be not carried too far, and that they be used with modesty, so as to cause no trouble or uneasiness to those that live about us."

It is needless to say that the references in Pufendorf's footnotes do not show any historical custom of making the social contract suggested by him.

[18] Bk. IV, Treatise 1, c. 43, § 2, f. 232.

[18a] The original text of the part italicized is *"per quam prohibetur nequis faciat in suo per quod nocere possit vicino."*

[19] And see *ibid.*, f. 232 b.

servitudes; and Bracton would protect the servitudes by the assize of novel disseisin, the early common law action to regain possession of land of which the plaintiff had been forcibly deprived. After showing that an act may be done entirely upon one's own land and yet destroy one's neighbor's easement or servitude, he says in Chapter 44, "Such a nuisance does not much differ from a disseysine, and therefore ought to be removed by a writ of novel disseysine, since it is tortious, at the cost of him who has put up the work, if he has it on his own ground"; adding that if it was done upon the plaintiff's ground, of course novel disseysine would lie.

It may very well have been that if the injury to the neighbor had been the overflowing of his land by water forced back upon it by the raising of a milldam, the lawyers at that time would have agreed with Bracton in saying that the owner of the overflowed land would have his remedy for that interference with his enjoyment likewise by a writ of novel disseysine; and no one could deny that he was deprived of the use of his land.[20] But it was a very far step from recognizing the right in that case to recognizing the broad proposition as Bracton lays it down, that it is prohibited that one may do on his own land anything that may be an injury to his neighbor.

We have, too, an excellently reported case in Y. B. 20 E. I 224, Rolls Edition, a few years later than Bracton, showing that his immediate successors were firmly fixed upon the idea

[20] The question of damage caused by the increased height of a milldam was interestingly presented in this cause numbered 1081 in BRACTON'S NOTE BOOK of cases decided in his time (Edited by F. W. Maitland). The matter was that R had raised a milldam higher than he should have done, and so injured W; and that justiciars had ordered the dam lowered by two feet. But W, before the day appointed for the lowering, went with his men and destroyed the whole dam, to the great injury of R. This seemed to have deprived W of all the rights in the eyes of the justiciars, for they ordered W to put the dam back apparently as it was. There are numerous cases in the Year Books of action for nuisance allowed for flooding a meadow by raising a dam. Y. B. 32-33 E. I., Rolls Ed., 330; Y. B. 14 E. II., 422, etc. For instances of the interference of right of common by the digging of ditches, see cases numbered 1196, 1253, 1785 and 1804 in BRACTON'S NOTE BOOK. These cases were upon the assize of nuisance, however, instead of novel dis-

that a man could do what he chose with his own, cost his neighbor what it might. A brought a writ of nuisance against B for cutting down a hedge and filling a ditch which protected A's field of corn, thereby letting cattle in to destroy it, and in the pleading A admitted that the ditch and hedge were entirely upon B's land, which the court held precluded A from recovering. And another case of similar intent may be found in Y. B. 33-35 E. I 258, Rolls Edition.[21] At any rate, down in the Seventeenth Century we see the courts disturbed over the question of whether a man is liable to an action of case for idly discharging firearms on his own lands, the noise of which frightened flocks of game fowl from ponds on the plaintiff's land nearby.[22] And even in 1843 by the question whether a man may dig a well on his own land which makes dry a well on his neighbor's land adjoining.[23] And the court in neither case found any precedents to help it to a decision.

The maxim in its modern form, *"sic utere tuo ut alienum non laedas"*, so use your own as not to work needless hurt to another, seems to be quoted to us first by Lord Coke in Wm. Aldred's Case,[24] and though, as we see from the duck case and the well case, he was, like Bracton, far ahead of the law of his time, yet his great prophetic mind presented a principle of jurisprudence upon which a large body of the Common

seisin. In case No. 1979 the assize of novel disseisin was brought apparently to regain the right to use a mill, and judgment was prayed whether there could be an assize therefor as for a free tenement; and the court did not allow it. In the light of the opinion of Bracton referred to above in the text, this case, as well as the use of the assize of nuisance above, is puzzling.

[21] In Y. B. 11 & 12 E. III., 468, Rolls Ed., however, an assize of nuisance was brought because the defendant had put large stones upon his wall, with the result that the rain was thrown from them onto the roof of the plaintiff's house hard by, and rotted it, and the court tried the case upon the issue of fact, the defendant not raising the question of law.

[22] Duck case in Modern Rep. See AMES, CASES ON TORTS.

[23] Acton *v.* Blundell, 12 M. & W. 324; but this notion of absolute right to use one's land without regard to his neighbors was disapproved in 1859 in the House of Lords by Lord Wensleydale (Baron Parke) in Chasemore *v.* Richards, 7 H. L. C., at p. 388.

[24] 9 Rep. 59a.

Law has subsequently found a support, and which comes nearer than probably any other principle to dispensing with the technical distinction between rights in a court of law and rights in a court of equity, applying equally to both.

After having thus distinguished what have been termed unclassified real property rights by identifying them as those comprehended under the rule which requires every man to so enjoy his own land as not unreasonably to interfere with his neighbors' reasonable enjoyment of theirs, it is perhaps unnecessary to attempt a further classification of them. To do so involves to some extent a general classificaion of real property rights, and to make a thorough classification of real property rights would require a volume in itself. But many of the rights comprehended under the maxim referred to are so generally treated as distinct in themselves, that, without some tabulated connection being shown between them, their successive treatment as divisions of our one study might appear to be ill grounded, and the hurried investigator of one subject alone might lose the assistance to be derived from comparisons.

William Brown, in his work on the Law of Limitations,[25] says that "the law of property might be divided into (a) the law of obligations, and (b) the law of things; and under the former class would be included possession, *possessio, pedis possessio,* or *quasi pedis possessio,* (Savigny on Possession, Bk. I, Sec. 6) which is the basis of the law of prescription." Thus to class the possession taken apart from the conception of the land possessed as an obligation is to resort to the methods of reasoning of the German writers on the Roman Law, but at the same time to bring down upon us one of the first problems—whether possession is a legal relation or a mere fact.[26]

But while the notion of our Common Law, possession of land involving *prima facie* ownership, can never be represented by Roman Law terms, their *"possessio"* conveying the idea of mere detention, and their *"possessio civilis"* and *"usucaption"* embracing the ideas of *bona fides* and just ground for possession; we must realize that in classifying Common Law rights, labor

[25] Bk. II, p. 68.

[26] SAVIGNY, POSSESSION, Bk. I, §§ II, V, VI.

will be immeasurably reduced by availing ourselves of the classification of the Roman or Civil Law as far as may be without conflict with Common Law history. The Civilians regarded property as comprehending all the real rights attached to it, and an additional right like a servitude upon another piece of property merely as another right added, as it were, to the original bundle, although, of course, it could be considered separately as a part of the total ownership represented by the servient tenement in itself.[27] So, for the purposes of classification, rights in real property under the Common Law may be assimilated to the same theory without great difficulty, if we only bear in mind that in the Common Law all the rights comprehended in the notion ownership are *prima facie* allowable to one in actual possession claiming ownership, and whose claim is not in process of litigation.[28]

Once assume that possession is a legal relation, that of assumed ownership, and not a mere fact, without regard to whether the assumption may not be overthrown on denial and determination between the claimants, and for the purpose at hand the requirements of the Civil lawyers seem to be satisfied.

This attempt to assimilate Civil Law methods of classification is not made in any plan to find for the property rights heretofore designated as unclassified corresponding rights, or even corresponding designated terms under the Civil Law. On the contrary, we shall see that the Roman Law, probably on account of its complete codification, appears to have had no principle capable of being applied so generally as our doctrine that one shall so use his own land as not to work needless hurt to his neighbor. But the principle of the Civil lawyers thoroughly underlying analytical classification of property rights is the conception of property as comprehending the totality of all real rights, and it is believed to be necessary to consider property un-

[27] See SAVIGNY, POSSESSION, Bk. I, § IX.

[28] It will at once appear that in this light Common Law possession involves what Savigny shows amounts to a juridical possession, but would not necessarily allow of *usucaption*. A thief or a robber might have an *animus domini*, and hence a juridical possession. SAVIGNY, POSSESSION, Bk. 1, § IX, p. 73.

der the Common Law in exactly the same light in order satisfactorily to classify the rights connected with it.

Thus the man who possesses a piece of land not incumbered by rights of any sort imposed by acts of the parties, and claims to own the same, is in the eye of the law owner of all the rights connected with the land. If he has over adjoining land an easement appurtenant to his land, he owns a part of the total bundle of rights connected with that adjoining land.

But now comes in the extension of the Common Law notion of possession.[29] In the same way that a man possesses his own land he possesses additional rights, whether easements or profits, which constitute part of the total property in the neighboring land. And to those so possessed by him the neighbor may add any further number by express contract or covenant. And finally from mere contiguity of possession, and whatever may

[29] Real Property Rights may be divided:

I. With reference to *quantum* of estate
  A. Allodial (Capable of possession and affected by Statutes of Limitation)
  B. Feudal (")
    1. In fee (")
    2. For life (")
    3. For years (")

II. With reference to *quantum* of interest
  A. Total ownership (")
    1. Fixed and recognizable (whether entire or fractional) (")
    2. Uncertain and unrecognizable (as minerals) (")
  B. Partial ownership
    1. Fixed and recognizable
      a. Easements (Capable of *quasi* possession and affected by Statutes of Limitation)
      b. Rents charge (")
      c. Profits (")
    2. Uncertain and unrecognizable
      a. Created by act of parties
        (1) Covenants which run with land
      b. Created by law
        (1) Right of lateral support (Generally not affected by Statutes of Limitation)
        (2) Right of natural grade, etc. (")
        (3) Right that one's neighbor's use shall not unreasonably interfere (")

be the duration of the legal right to possession, the law imposes on both neighbors the interchange of certain rights and obligations, all of which seem to be comprehended in the principle that each must so use his land as not to interfere with the reasonable use of the adjoining land by his neighbor.

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